instructions, whether such conduct was taken under color of state law.

In *Adickes v United States*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), the plaintiff alleged that an employee of a privately-owned restaurant and a police officer agreed to deny her service because she was accompanied by African-American students. This Court discussed the principle that a private individual may act "under color of state law" by conspiring with a governmental official to violate another's constitutional rights. Summary judgment for the defendant was reversed, because "[i]f a policeman were present, we think *it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding* that petitioner should be refused service." *Id.*, 398 U.S. at 158-59, 90 S. Ct. at 1610 (emphasis added).

In its unpublished opinion, the Sixth Circuit relied on *Chapman v. Higbee Company*, 319 F.3d 825 (6th Cir. 2003) (*en banc*), *cert. denied*, 542 U.S. 945, 124 S. Ct. 2902, 159 L. Ed. 2d 827 (2004). In *Chapman*, the plaintiff alleged that her constitutional rights were violated when she was stopped and searched by a store security officer. The security officer was an off-duty sheriff's deputy who was wearing his official uniform, badge and gun. The district court granted summary judgment to the defendant, finding that the security officer was not acting under color of state law. The Sixth Circuit reversed in an *en banc* opinion, holding that there was a genuine issue of material fact which should be resolved by the jury.

> The inquiry is fact-specific, and the presence of state action is determined on a case-by-case basis. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Although "it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Id.* at 834.

Chapman relied on *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980). In that case, a police officer responded to a domestic disturbance call at the plaintiff's home. Three days later, the plaintiff encountered the officer who was on vacation. An argument ensued. The plaintiff was shot. The district court set aside the jury's verdict for the plaintiff, concluding that the officer was not acting under color of state law. The Sixth Circuit reversed and reinstated the verdict.

> Although in certain cases, it is possible to determine the question whether a person acted under color of state law as a matter of law, . . . *there may remain in some instances "unanswered questions of fact regarding the proper characterization of the actions" for the jury to decide. . . .*
>
> In this case, the trial judge fully instructed the jury of the meaning of color of law and related issues. *Id.* 627 F.2d at 13 (emphasis added and internal citations omitted).

The highlighted language from *Layne* has been cited by other circuits. *Focus on the Family v. Pinellas Suncoast*

Transit Authority, 344 F.3d 1263, 1276-79 (11th Cir. 2003); *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990).

Other courts of appeals similarly recognize the importance of the jury's role when there are factual disputes relating to whether a defendant was acting under color of state law. *See Dang Vang v Vang Xiong X. Twoed*, 944 F.2d 476, 480 (9th Cir. 1991) (evidence was sufficient for jury to conclude that state employee acted under color of state law when raping refugee); *Griffin v City of Opa-Locka*, 261 F.3d 1295, 1303-04 (11th Cir. 2001) (jury reasonably concluded that city manager acted under color of state law when sexually harassing and assaulting employee); *Dossett v. First State Bank*, 399 F.3d 940, 949-50 (8th Cir. 2005) (evidence was sufficient for jury to conclude that school official acted under color of state law; instruction was erroneous); *Zambrana-Marrero v. Suarez-Cruz*, 172 F.3d 122, 127-29 (1st Cir. 1999) ("sufficient indicia of official police action that a jury . . . could conclude that they acted under color of state law, albeit in clear abuse of their authority."); *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174-75 (10th Cir. 1997) (allegations, if substantiated at trial, would be sufficient for claim of sexual harassment under color of state law within § 1983); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611-13 (5th Cir. 1980) (determination "must be made by sifting facts and weighing circumstances case-by-case"; disputed factual issues concerning involvement of state officials required trial).

The submission of disputed factual questions to the jury necessarily follows from the holding in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). Because an action for money damages under § 1983 is an "action at law" within

the Seventh Amendment, issues of fact should be determined by a jury based on appropriate instructions. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 79 L. Ed. 1636 (1935).

Petitioner's argument that respondent admitted that he acted under color of state law is simply wrong. In its initial opinion reversing summary judgment for respondent, the Sixth Circuit "conclude[d] that [petitioner] created a genuine issue of material fact as to whether [respondent] acted under color of state law." *Dean*, *supra*, 354 F.3d at 544. On the appeal after trial, the court held that there were "competing factual allegations surrounding" the color of state law question which were properly submitted to the jury. [Opinion – Appendix 4a]

Finally, petitioner makes a half-hearted argument in his submission that the "color of state law" instruction was "grossly inadequate". [Petition, p. 7] However, as the Sixth Circuit noted, petitioner did not object to the instruction at trial. [Opinion – Appendix 4a-5a] Use of the model instruction from 3B O'Malley, *Federal Jury Practice & Instructions, Civil*, § 165.40 (5th ed.), hardly amounts to "plain error" under FED. R. CIV. P. 51(d)(2).

CONCLUSION

For these reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 05-889

In the Supreme Court of the United States

E. STEPHEN DEAN
Petitioner,

v.

THOMAS K. BYERLEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

E. STEPHEN DEAN
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212 SOUTH MAIN ST.
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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for Defendant and against Plaintiff on all claims.

Ronald C. Weston, Sr.
Clerk of Court
/s/Melva I. Ludge
(By) Melva I. Ludge, Deputy Clerk
Date: October 25, 2004

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

OPINION

Presently before the Court is Plaintiff's motion new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. The Court will deny the motion for the reasons set forth below.

Background

Plaintiff, E. Stephen Dean ("Dean"), a graduate of law school but not a lawyer, sued Defendant, Thomas K. Byerley ("Byerley"), an employee of the State Bar of Michigan, alleging that Byerley violated Dean's First Amendment right to picket when Byerley, according to Dean, told Dean that if he continued to picket he would never become a member of the State Bar of Michigan. This picketing was done by Dean and two persons hired by Dean from the Volunteers of America at 7:30 am in a residential area. Pictures of the picketers shows persons dressed warmly on a cold day, with sweatshirt hoods over their heads. Earlier, this Court granted summary judgment for Byerley on the grounds that Byerley was not acting under color of state law when he made the alleged statement to Dean. Taking the facts in the light most favorable to Dean, the United States Court of Appeals for the Sixth Circuit reversed and said, assuming that Dean's allegations were true, that this Court erred: Dean and his hires had a constitutional right to picket in this residential area, and Byerley was acting in his

official capacity when he made the alleged remarks. See Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004).

Following remand, this case was tried to a jury from October 20 through October 23, 2004. After deliberating, the jury returned a verdict for Byerley on October 23. Judgment was entered for Byerley on October 25, 2004. On November 5, 2004, Dean moved for a new trial pursuant to Fed. R. Civ. P. 59 alleging several errors by this district court. The motion is timely. See Fed. R. Civ. P. 59 (b).

Motion Standard

In determining whether a new trial should be granted, this Court must apply federal law. Clay v. Ford Motor Co., 215 F.3d 663, 672 (6th Cir. 2000). Rule 59(a) states, in pertinent part, that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." As stated in Moore's Federal Practice § 59.13 [1] (3d ed. 2003), there is no fixed standard when applying Rule 59, and the granting of a motion for new trial is discretionary with the district court. See also Royal College Shop v. Northern Ins. Co. of N.Y., 846 F.2d 1247, 1251 (10th Cir. 1988). In this case, Dean raises errors in jury instructions, evidentiary rulings, and defense counsel's conduct as bases for a new trial. Such grounds may be proper where there were substantial errors in the admission or exclusion of evidence, or in the court's instructions to the jury, such that a miscarriage of justice would result if a new trial were not granted. Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891-92 (4th Cir. 1979); see also Schultz v. Amick, 955 F. Supp. 1087, 1105 (N.D. Iowa 1997) (stating that "where the questioned rulings fall within the court's discretion under the Federal Rules of Evidence and the substance of those rulings does not amount to plain error, there is no ground for a new trial based upon evidentiary rulings"); Moore's Federal Practice § 59.13[2] ("As a general rule, courts will not disturb jury verdicts in the absence of extreme circumstances, such as a case of manifest injustice or abuse of the jury's

function."). With these principles in mind, the Court will address the grounds submitted by Dean for a new trial.

Discussion

1. Dean claims that the court of appeals had already decided that Byerley was acting under color of state law, and, therefore, it was wrong for this Court to have submitted this issue to the jury.

This Court during the course of trial already ruled on this issue. The Sixth Circuit addressed the issue of whether Byerley was acting in the course of his employment in a situation which came to it as an appeal from summary judgment. In its ruling, the court of appeals made it clear that it was taking all of Dean's allegations as true. See Dean, 354 F.3d at 544 (stating that "we conclude that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law.") This is a different standard than is applied during the trial. During the trial, Byerley denied that he told Dean that if he continued picketing he would never become a member of the State Bar. Byerley claimed that he simply told Dean that if he went or stayed on Byerley's private property, he would charge Dean with trespassing. Any citizen can charge trespassers, either civilly or criminally, of trespassing if there is in fact trespassing. There is no state action if one does so. Byerley did not lose his rights as an ordinary citizen simply because he works for the State Bar of Michigan. Therefore, the jury was free to believe Byerley and disbelieve Dean about what was said during the brief confrontation in Byerley's driveway.

2. Dean claims that this Court admitted unfair and prejudicial evidence and that he was the victim of improper statements by defense counsel.

Dean claims that he was prejudiced by defense counsel's opening statement and by the admission into evidence of prior litigation instituted by Dean. As to the opening statement, Dean is vague about the particular statement that he thinks is prejudicial. In

any event, the jury was told that the opening statement was merely an outline of the evidence and that it would have to make its decision based solely on the evidence. As to the introduction of evidence regarding past litigation, this Court prohibited Byerley from introducing evidence of several lawsuits filed by Dean. This Court did, however, allow Byerley to introduce certain correspondence between Dean and the State Bar relating to certain lawsuits filed by Dean because these cases were part and parcel of the State Bar's investigation into Dean's character and fitness to practice law in Michigan. In this regard, Dean was treated no differently than any other applicant to the State Bar. Furthermore, this evidence was very relevant to the issue of what was delaying the processing of Dean's application in that Dean would not furnish the information requested by the State Bar. This cut against Dean's argument that he was being singled out for retribution because he picketed Thomas Cooley Law School. Finally, this Court instructed the jury at the time the evidence was admitted that the evidence was admitted solely to show the application process and the possible reasons for its delay and could not be considered by them as to whether Dean had a litigious personality.

3. Dean also complains that he was not allowed to present evidence at the trial.

At the outset, Dean admits that the erroneous exclusion of evidence would not be grounds for a new trial unless the admission of the evidence would have led to a different result. See Morales v. Am. Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998). Moreover, Fed. R. Civ. P. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

Dean claims that he should have been allowed to introduce evidence that Byerley complained about Dean's picketing to the State Bar Grievance Committee because Byerley was allowed to introduce evidence of Dean's picketing the president of Cooley Law School immediately after he picketed Byerley's house. The evidence of what happened to Dean's application after the picketing had minimal relevance because Dean's entire complaint revolved around statements that Byerley allegedly made to Dean by Byerley's driveway. The issue of what happened to Dean's application and anything that Byerley said about Dean was actually disposed of by Magistrate Judge Brenneman's ruling denying Dean's motion to amend. During the hearing on the motion before Magistrate Judge Brenneman, Dean said that he was not alleging that Byerley did or did not do anything improper to deny Dean admission to the bar. In response to Magistrate Judge Brenneman's inquiry regarding whether Dean was alleging that Byerley "actually did anything to prevent [Dean] from being admitted to the bar," Dean responded, "That's absolutely right. I am not alleging that." (8/15/01 Hr'g Tr. at 8.) Dean did not appeal this ruling; nor did he move to file a supplemental complaint. Therefore, it would have been quite prejudicial to Byerley to, at the last minute, change the focus of Dean's complaint from chilling his picketing rights to interference with his bar application. Since Dean did not know about any alleged interference with his bar application at the time he made the above remarks, it can hardly be said that whatever, if anything, Byerley did about his application somehow affected Dean's picketing rights.

In contrast, as to the admission of subsequent picketing by Dean immediately after the Byerley picketing, this evidence was relevant to Dean's claim that his picketing was "chilled" by Byerley's alleged statement and any damages that Dean might claim.

Dean claims that he should have been allowed to introduce evidence about Byerley's alleged misrepresentations to federal

courts as reflected in "the State Bar of Michigan's own official publication, ..." This reference was not any type of official action or canon of the State Bar. It was simply a letter to the editor of the State Bar magazine which expressed that member's opinions. There is no basis for admitting this so-called evidence because it was not evidence of anything.

Dean claims that this Court should not have admitted the testimony of Keith Wilkinson about Dean's character and fitness while precluding Dean from producing evidence concerning Byerley's adverse statements to the Character and Fitness committee. The Court disagrees. Wilkinson's testimony provided background regarding Dean's complaints about the State Bar and was relevant to show the reasons for the delay in the processing of Dean's State Bar application and to give context to the events of March 27, 2001. Moreover, contrary to Dean's assertion, no confidential information from his character and fitness file was disclosed at trial. Therefore, the admission of such testimony did affect Dean's substantial rights or result in a miscarriage of justice.

Dean claims that this Court instructed him to limit his evidence to events outside of Byerley's home while permitting Byerley to introduce evidence of picketing outside of the president of Cooley Law School's home, which, according to three witnesses and police records, occurred shortly after Dean left the Byerley home. The admission of the other picketing was relevant to the issue of Dean's claim that he was afraid of picketing because of what Byerley had said to him. Dean was not prohibited from introducing evidence on this issue. In fact, Dean testified in direct contradiction to the president's testimony, the president's neighbors' testimony (as to the date of this picketing), and to the police department record of responding to a call (as to the time and date of this picketing).

4. Dean claims that the Court should not have admitted testimony about picketing outside of the Cooley Law School and outside of its professors homes.

Dean must have forgotten that he testified and argued during the course of the trial that his picketing of the Cooley Law School must have been known to employees of the State Bar because the law school is near the State Bar Building. This was part of Dean's argument that the intent of Byerley was to chill Dean's First Amendment right to picket. In addition, this Court allowed evidence of the picketing of the homes of the president of the law school and a professor of the law school because they occurred right after the picketing of Byerley's house. This was relevant to the issue of damages and whether, as Dean claimed, he really was afraid to picket after his alleged confrontation with Byerley.

5. Dean claims that his trial was unfair because Byerley had access to privileged information in his Character and Fitness file and the Court subsequently ruled that Dean could not introduce evidence of Byerley's improper attempt to stop Dean from becoming a lawyer.

What occurred in the Character and Fitness investigation of Dean was relevant only to the extent that it showed the jury what was delaying Dean's application. As stated above, Magistrate Judge Brenneman ruled, based upon Dean's own admissions, that Dean could not introduce evidence that Byerley improperly interfered with Dean becoming a member of the State Bar. Therefore, evidence regarding Byerley's actions subsequent to Dean's picketing at Byerley's home was irrelevant to Dean's claim in this case.

6. Dean claims that the Court erred in allowing Byerley to add the new affirmative defense of trespassing.

Assuming that trespass would constitute an affirmative defense in this case, as opposed to a defense which merely negates an element of Dean's claim (which the Court is inclined to conclude it is), Dean was aware prior to trial that Byerley intended to raise an issue as to whether Dean was trespassing on Byerley's property. (Pl.'s Trial Br. at 4 (("The Defendant has suggested that

he is going to allege that Plaintiff was trespassing on Defendant's property, even though in representations made in this Court and on appeal, Defendant took the position that it was 'not clear' if a trespass took place.").) Thus, Dean had ample notice that Byerley would claim that Dean was trespassing, and Dean has failed to show how he was prejudiced by the admission of Byerley's testimony on that issue. Moreover, the issue of whether Dean was trespassing is relevant to the issue of Dean's and Byerley's credibility as to what was said in Byerley's driveway.

Conclusion

For the foregoing reasons, the Court will deny Dean's motion for new trial. An Order consistent with this Opinion will be entered.

Dated: January 5, 2005 /s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

ORDER

In accordance with the Opinion filed on this date, IT IS HEREBY ORDERED that Plaintiff's Motion For New Trial (docket no. 147) is DENIED.

Dated: January 5, 2005 /s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE